

Arizona's Open Meeting Law



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Legislative Intent: Openness in Government

- A.R.S. § 38-431.09
- Arizona's public policy requires that official deliberations and proceedings be conducted openly
- any uncertainty should be resolved in favor of open and public meetings



LEGAL RESOURCES

- A.R.S. §§ 38-431 through 38-431.09
- Arizona Agency Handbook
 - www.azag.gov (under “Quick Links”)
 - Chapter 7 (Open Meetings); §§7.1-7.12.6



“Public Body”

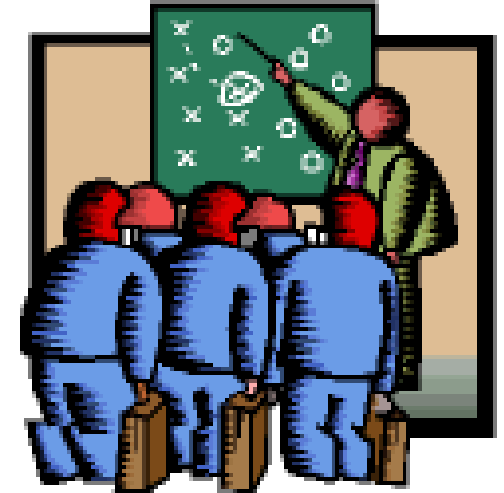
- A.R.S. § 38-431(6); §7.3.1

- **“Public Body” means:**

The Legislature, all boards and commissions of this state or political subdivisions, all multimember governing bodies of departments, agencies, institutions and instrumentalities of the state or political subdivisions, including without limitation all corporations and other instrumentalities whose boards of directors are appointed or elected by the state or political subdivision.

- All quasi judicial-bodies and all standing, special or advisory committees or subcommittees of, or appointed by, the public body.

Advisory Committees & Subcommittees

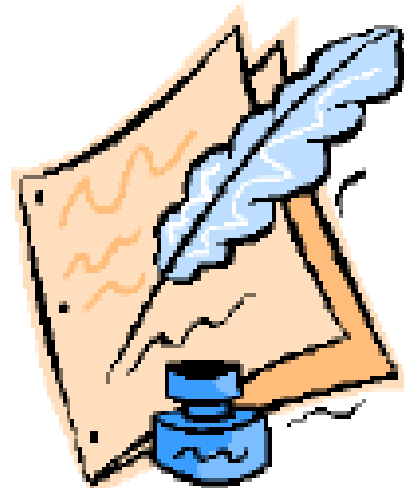


■ **“Advisory Committee” or “Subcommittee” means:**

- Any entity, however designated;
- Officially established on motion or order of the public body or by the presiding officer;
- Appointed to make a recommendation concerning a decision to be made or considered by the public body. (A.R.S. §38-431(A) as amended by H.B. 2208 (2007)).

Advisory Committees & Subcommittees

- Must comply with all requirements of the Open Meeting Law
- Must take minutes or make recordings of their meetings (New pursuant to H.B. 2208, 2007).



What's a “meeting” ?



- A.R.S. § 38-431(4); §7.5.1
- Gathering, in person
- or through technological devices
 - phone, email, fax



“Meeting”



- a quorum
- discuss, propose or take legal action
- including deliberations



What's a quorum?

- Generally in Arizona, a quorum is a majority of a board or commission.
- Look to your statutes and rules.
- Vacancies DO count toward the number of members of a board unless your statutes/laws say otherwise.



What if you don't have quorum?

- You don't have a “meeting”
- You can't meet



Discuss, Propose or Take Legal Action

- Normal use and meaning of these words will apply.
- Proposing legal action = “put forward for consideration, discussion, or adoption.”
- Includes deliberations = discussion of facts and opinions re: potential board business.

RULE: If this occurs among a quorum of the Board = A MEETING.

Telephone Conferencing



- § 7.10. 2
- Allowed if the public body has approved this practice.
- The notice and agenda should indicate telephone participation.
- The public must be able to hear.
- Minutes should identify telephonic participants and describe public access.



Meeting Locations

- § 7.10.1
- Meetings must be accessible
- Discourage procedures that obstruct or inhibit public attendance such as:
 - Remote or inadequate location
 - Required sign in sheets
 - Unreasonable time



Public Access to Meeting

- Can you move the meeting to another location close to the original location?
 - **X** YES ☐ NO
- leave a staff person to give directions
 - post a large notice
 - start the meeting a little later



NOTICE OF MEETINGS

- A.R.S. §38-431.02(A)(1); § 7.6.3.1
- Public bodies of the State must file a disclosure statement with the Secretary of State identifying where the public body will post meeting notices.
 - Is statement still current?
 - Did you move your offices but not your notice location?
 - Check statement once a year.

Notice of Meetings



- § 7.6.3.2
- Post in a location where the public has reasonable access (unlocked building; geographically accessible)
- Post during normal business hours
- Make sure notice can't be “borrowed”
- Make sure front **and** back can be read if inside a locked display case



Notice of Meetings

- A.R.S. § 38-431.02(C);
§ 7.6.1-7.6.3
- Notice required at least 24 hours in advance of a meeting
- to all members of the public body
- to the public

Contents of Notice



- § 7.6.4
- The public body
- Date, time, place (address, room number)
- Agenda or how to obtain agenda
- Executive Session if applicable (cite specific statutory authority)
- Accommodations under the ADA



Notice of Regular Meetings

Practical Pointers:

- Consistent meeting times
 - Avoid moving targets
 - 6:00 a.m. one time and 8:30 p.m. another
- Avoid cancellations and rescheduling
- Be careful about scheduling special meetings
 - only if necessary, and give plenty of notice



Proof of Posting

- §7.6.9
- Document the date, time and place of posting
 - May want to create a “Certification of Posting Notice”
 - See Form 7.8
- Keep a record of notices and certifications of posting

Social Events



- If more than a quorum may be present
- 1. Post a “courtesy notice” announcing social event where a quorum may be present
- 2. Include statement that no business of the public body will be discussed & no action will be taken
- 3. Board members should avoid talking with each other - or have a witness!



Recessed & Resumed Meeting

- A.R.S. §38-431.02(E); § 7.6.5
- Can **recess and resume** a meeting with less than 24 hours notice if proper public notice of initial session of the meeting is given and, prior to recessing, notice is publicly given regarding the time and place of the resumed meeting or regarding the method by which notice shall be publicly given.



AGENDAS

- A.R.S. § 38-431.02(H); § 7.7.1
- Agendas must include matters to be
 - discussed,
 - considered or
 - decided
 - at the meeting
- Must contain information reasonably necessary to inform the public

Understandable

- No acronyms
- statutory cite is not enough without explanation
- no legalese
- no agency slang





Agenda Items

- § 7.7.2 - “specific” items to be discussed, considered or decided
- **NOT** GOOD ENOUGH without details:
 - “new business”
 - “old business”
 - “personnel”
 - “announcements”



If it's not on the agenda

- § 7.7.6 - **Cannot** discuss
- all discussion must be **reasonably related to** an adequately-described agenda item
- Add new items to the agenda for future meeting



Backup Materials

- Members' packets
- State on the agenda where they will be available for public inspection
- Must be available 24 hours before the meeting
- Can charge reasonable public record fee for copies



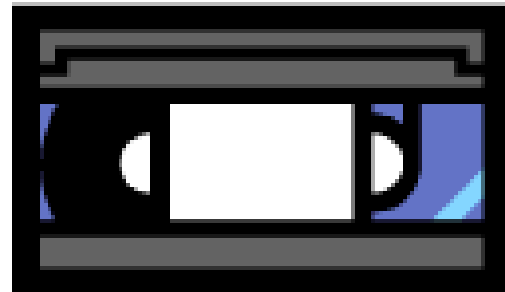
Changes in Agenda

- § 7.7.10
- post and distribute same as original
- 24 hour rule still applies

MINUTES



- A.R.S. §38-431.01(B); §§ 7.8.1-7.8.2
- Must have them
- in writing or
- recorded - audio or video tape





Contents of Minutes

- date, time, place
- members present/absent
- general description of matters discussed or considered
- accurate description of legal actions proposed, discussed or taken
- name of members who propose each motion
- name of each person making statements or presenting material and a reference to the legal action addressed



Contents of Executive Session Minutes

- date, time, place
- members present/absent
- general description of matters discussed or considered
- accurate description of instructions given to attorneys regarding contracts, litigation or settlement options
- accurate description of instructions given to designated representatives regarding
 - negotiations with employees for salary/benefits
 - negotiations for purchase, sale or lease of real property

Public Access to Minutes

- A.R.S. § 38-431.01(D); § 7.8.1
- Minutes or a recording shall be available for public inspection 3 working days after the meeting
- make tape available
- can stamp as “Draft”





Public Access to Executive Session Minutes

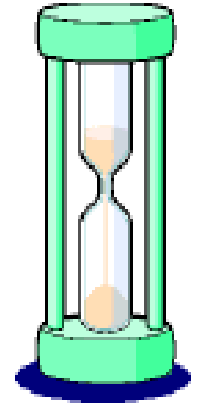
- A.R.S § 38-431.03(B); § 7.8.1
- Executive session minutes or recordings shall be kept confidential

Separate Tapes and Minutes

- Use separate tapes and written minutes for the public sessions and the executive sessions
- Makes prompt disclosure possible without redaction

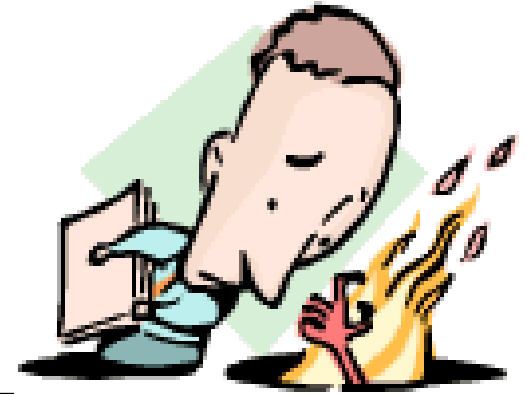


PUBLIC'S RIGHTS



- Must be permitted to attend meeting
- Cannot require them to sign in
- Not permitted to speak, unless public body allows it
- If they make presentation, must identify themselves (required for Minutes)
- Cannot disrupt proceedings (but make a good record before removing someone)
- Can limit speaking time of each speaker

Calls to the Public



- A.R.S. §38-431.01(H); § 7.7.7
- Optional
- Avoid pitfall of getting into discussion of matters not on the agenda
- Public body's response is limited:
 - direct staff to study the matter
 - respond to criticism
 - schedule matter for future meeting

Public's Recording of Proceedings

- Public may record on tape, camera or video (ARS § 38-431.01(F))
- May restrict only if it truly interferes with conduct of the meeting



EXECUTIVE SESSIONS

- Just because you CAN have one, should you?
- Public suspicion vs. actual need



Executive Sessions



- A.R.S. § 38-431.03; § 7.6.7
- “gathering...from which the public is excluded...” (A.R.S § 38-431)
- Must include in the notice that you may go into executive session if you plan to do so (cite specific statutory provision)
- Executive Session is allowed for specific types of items
- Must be item on the agenda.



Executive Sessions

- § 7.9.1 - must first vote (in public session) to go into executive session
- Chair asks members of the public to leave the room; or members adjourn to another room
- Chair is required to remind members that the matters discussed and minutes of the executive session are confidential



Executive Sessions

- Only certain subjects are allowed
- Restrict discussion to purpose for which adjourned
- No ACTION permitted
- Must return to public session for a vote
- Must have Minutes



Executive Session Categories

- A.R.S. §38-431.03(A)(1)-(7); § §7.9.4-7.9.10
- Personnel matters
- Confidential records
- Legal advice
- Litigation, contracts and settlement discussions involving attorney consultation
- Employee salary discussions
- International, interstate and tribal negotiations
- Purchase, sale or lease of real property



Who may attend Exec. Sess.?

- A.R.S § 38-431(2)
- Members of the public body
- officers, appointees and employees but only as allowed in A.R.S § 38-431.03
- auditor general in performance of official duties (A.R.S § 41-1279.04)
- “only individuals whose presence is reasonably necessary in order for the public body to carry out its executive responsibilities”



Legal Advice

- A.R.S. § 38-431.03(A)(3);§ 7.9.6
- discussion or consultation with attorneys ***for the public body***
- exchange of communication between lawyer and client
- members may NOT discuss between themselves what action to take
- members may NOT debate over what action to take - pros and cons; policy implications; alternatives
- mere presence of an attorney does not make it legal advice
- distinguished from legal consultation regarding litigation, contracts or settlement agreements

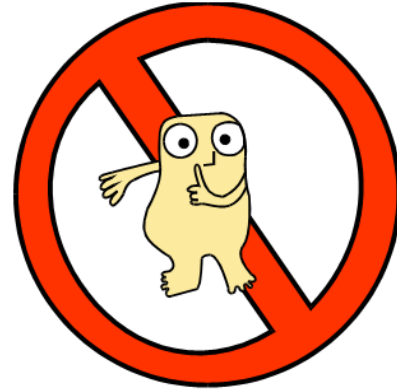


Taking Legal Action

- § 7.9.11
- CANNOT do this in executive session
- Must return to public session to vote
- NO STRAW POLLS IN EXECUTIVE SESSION

Executive Session Pitfalls

- Failure to keep executive session discussion confidential
- Failure to advise persons about the confidentiality requirement
A.R.S § 38-431.03(C)
- Individuals present who are not “reasonably necessary”
- Practical pointer: Put a reminder right on the agenda for the chair to recite Every Meeting



Executive Session Minutes

- § 7.8.4 - must keep them confidential
- keep separate tapes and minutes for public and executive sessions





Who may have access to executive session minutes?

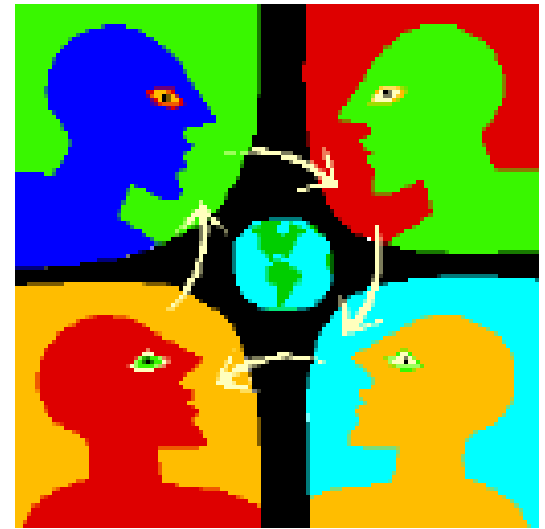
- A.R.S. § 38-431.03(B); §7.8.4
- members of the public body, including members who did not attend meeting
- officer, appointee or employee who was the subject of the meeting authorized by A.R.S. §38-431.03(A)(1)
- attorney for the public body
- auditor general
- attorney general or county attorney investigating Open Meeting Law violations
- the court



Avoiding OML Violations

- DO NOT discuss, propose, deliberate or take legal action on any potential board business between a quorum of the board outside a properly noticed public meeting.
- “Board business” – read broadly! Includes anything that may foreseeably come before the board for action.

Circumvention



- Serial Communications - § 7.5.2
- cannot have meetings with less than a majority or use any device to circumvent the law
 - meeting with individual members
 - reporting what other members said
 - polling the members



Meeting “Etiquette”

Discourage the Following:

- Whispering to other Board members
- Passing notes between Board members
- Letting members of the public talk to each member before the meeting starts with their hands over the microphone
- If it's about business of the public body, this could become a violation
- In any event, it looks like a violation



AG Opinion on E-Mail

- No. 105-004 (R05-010)
- Re: Open Meeting Law Requirements and E-mail to and from Members of a Public Body
- Issued July 25, 2005
- Available: www.azag.gov



Conclusion No. 1

- E-mail communications among a quorum of a public body are subject to the same restrictions that apply to all other forms of communications among a quorum.



Conclusion No. 2

- E-mails among a quorum that involve discussions, deliberations or taking legal action on matters that may reasonably be expected to come before the board constitute a meeting through technological means.
- Does not have to be simultaneous



Conclusion No. 3

- One-way e-mail communication by one member to a quorum of members that proposes legal action is a violation even if there is no discussion, deliberation or legal action taken.



Proposing an Agenda Item?

- Proposing an item for the agenda via e-mail is allowed if you do not propose legal action.
- Communicate the TOPIC only NOT the legal action you want the board to take.
- Do not discuss, deliberate or take legal action regarding the proposed agenda item.



“Propose” – EXAMPLES in the Opinion

- “Councilperson Smith was admitted to the hospital last night”
 - Does NOT propose legal action
- “We should install a crosswalk at First and Main”
 - Does propose legal action
 - It’s more than a topic for the agenda because it urges or suggests an outcome



One-Way E-mail from Staff

- Passive receipt of information from staff, without more, does not violate OML
- Staff may send e-mail to board members
- Staff may send agenda packets to board members



Suggestions for E-Mail

- If staff send e-mails to board members, you may want to include a notice that advises members not to forward the e-mail to other board members or copy other board members in their reply to staff.



Improper Staff Communication

- Staff may NOT send opinion or substantive communication about board business from a board member to enough other members to constitute a quorum
- Cannot use a 3rd person to violate the OML
- A third person can now be charged with a violation and pay penalties



E-Mails are Public Records

- E-mail communications of board members related to their official duties are public records that must be maintained for public inspection and reproduction.



In Summary . . .

- E-mail is a useful technological tool,
- But it must be used in a manner that follows the OML's mandate that all public bodies propose legal action, discuss, deliberate, and make decisions **in public**.



VIOLATIONS & SANCTIONS

- Actions are null and void
(A.R.S. § 38-431.06; § 7.12.1)
- Investigation by Attorney General or
County Attorney
(A.R.S. § 38-431.05; § 7.12.2)
 - may issue “investigative demands”
 - conduct examinations under oath
 - require written statements under oath
 - may file enforcement action in Superior Court



Civil Penalties

- A.R.S. § 38-431.07; § 7.12.3
- up to \$500
- for each violation
- against anyone who commits a violation
- against anyone who knowingly aids, agrees to aid or attempts to aid another in committing a violation
- Individual, not public body, pays penalty



Attorney's Fees

- A.R.S. § 38-431.07; § 7.12.4
- Violators could be ordered to pay successful plaintiff
- If court finds “intent to deprive the public of information or opportunity to be heard”- could require the board member to pay out of his or her own pocket



Removal from Office

- A.R.S. § 38-431.07; § 7.12.6.
- If intent to deprive the public of information or opportunity to be heard
- Court may remove the public officer from office



OMLET

- Open Meeting Law Enforcement Team
- Established by Arizona Attorney General in the mid-1980s
- Attorneys throughout the Attorney General's Office
- Investigates violations of the Open Meeting Law
- Seeks enforcement of Open Meeting Law
- (602) 542-5025; (800) 352-8431